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Nos. 94-2107 and 94-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF NANCY MELLETTE IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA

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S. Oliver, Jr., *A Survey of Post-Croson Devs.*, 38 Loyola L. Rev. 7 (1992) 28

INTEREST OF AMICUS NANCY ELIZABETH MELLETTE

Nancy Mellette is a South Carolina resident who has applied for admission to The Citadel, the Military College of South Carolina.[1] The Citadel is a public military-style college, set in a large campus in Charleston, South Carolina, which has excluded women since its founding in 1842. Ms. Mellette has long wished to join The Citadel's Corps of Cadets and is qualified in all respects for admission to the Corps, other than gender. She is now in her senior year of high school at Oak Ridge Miliary Academy, a military boarding school in Oak Ridge, North Carolina. She is a second lieutenant in her cadet cadre, ranks fourth in her class, and holds eleven letters in various sports. Ms. Mellette's father attended The Citadel; her brother is currently a senior at The Citadel.

The exclusionary policy of The Citadel was initially challenged by Shannon Faulkner. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) ("*Faulkner I*"). Ms. Faulkner pursued her claim and was ultimately admitted to The Citadel as a cadet in August 1995. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"). After Ms. Faulkner withdrew, Ms. Mellette successfully moved to intervene in the *Faulkner* action, which she is continuing to prosecute.

The decisions of the Fourth Circuit relating to the Virginia Military Institute ("VMI"), *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("*VMI I*") and *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) ("*VMI II*"), have provided controlling authority in the *Faulkner* litigation against The Citadel. Ms. Mellette consequently has a very substantial interest in the outcome of this Court's review of *VMI*.

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[1] The parties' written consent to the filing of this brief has been filed with the Court.

The Importance of The Citadel in South Carolina

The Citadel is the only public institution of higher education in South Carolina that offers a military-style education; it is also the only public institution that is sex-segregated. *Faulkner I*, 858 F. Supp. at 556. As the president of The Citadel has testified, The Citadel, which currently has approximately 1600 cadets, offers a regimented military structure and "no other institution in South Carolina offers an equivalent experience." Supplement to Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA Supp."), Exh. K at 92-97; 99-100.

Since its founding more than 150 years ago, The Citadel has played a central role in the history of South Carolina. For example, The Citadel's alumni include a sitting United States senator, multiple former governors of South Carolina, a United States ambassador, two sitting federal court judges, a sitting justice on the South Carolina Supreme Court, and the current president of the University of South Carolina, as well as numerous state legislators, prominent business leaders and senior military officers.

Like VMI, The Citadel offers its male students the invaluable benefits of its prestige, access to a powerful and influential alumni network, a rich endowment and other resources that are unparalleled in South Carolina. *See Faulkner II*, 51 F.3d at 450-51 (Hall, J. concurring). The accomplishments and prestige of The Citadel's alumni make it attractive to women as well as to men.

The Citadel admits that women could perform just as well as its male cadets and would benefit tremendously from its rigorous military-style program. Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA"), JA 237-238; JA 739. Unlike VMI, The Citadel's witnesses concede that The Citadel would still be able to fulfill its mission if women were admitted. JA 730-731.

Since the commencement of this lawsuit, Citadel alumni in positions of power in South Carolina have waged an aggressive campaign to preserve The Citadel as an all-male institution. Following the denial of VMI's petition for certio-

rari in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), several influential alumni met with representatives of The Citadel and its counsel to organize an effort to persuade the South Carolina general assembly to concoct a resolution to support The Citadel's discriminatory admissions policy. A prominent Citadel alumnus drafted a concurrent resolution, which has no force of law, that closely tracked the arguments made by counsel for The Citadel. Five Citadel alumni in the General Assembly sponsored the resolution.

Pursuant to the resolution, a legislative committee was formed for the ostensible purpose of reviewing existing opportunities for single-sex education for women in South Carolina, and making recommendations to the General Assembly. The Speaker of the House appointed a former member of The Citadel's governing board; six of its ten members also were graduates of The Citadel. Not surprisingly, the committee endorsed The Citadel remaining all-male and suggested that South Carolina consider providing opportunities for single-sex education for women. Neither the General Assembly, nor any state official, voluntarily has made any effort to address the absence of equal opportunities for women in South Carolina.

To the contrary, South Carolina repeatedly refused to comply with court orders to file a specific remedial proposal. In February, 1994, the South Carolina district court ordered that defendants file a remedial proposal by April 1, 1994. The district court ordered a hearing on the unresolved factual issues in the case. Given the Fourth Circuit's decision in *VMI I*, the district court limited the issues to be tried to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Ms. Faulkner and other similarly situated women. The Citadel defendants unsuccessfully sought to postpone filing a remedial plan until *after* a trial on liability. After the district court denied their request, South Carolina filed a proposal unilaterally declaring that it would submit a remedial plan 60 days after a finding of liability.

The District Court Decision in the Citadel Case

Following a two-week hearing on liability and remedy, the District Court issued its opinion on July 22, 1994 holding that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment. *Faulkner I*, 858 F. Supp. at 566. The district court found that South Carolina had refused to propose or develop any remedial plan, as it required, and ordered the immediate admission of Ms. Faulkner into the Corps of Cadets.

In its decision, the district court found that "[t]he unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Id.* It further found that "[t]he type of education available at The Citadel is not available at any other institution in South Carolina." *Id.*

The district court expressly rejected defendants' argument that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. Despite the defendants' request, the District Court made no finding that South Carolina had a policy of providing single-sex education; instead, the district court found that all of the formerly single-sex public colleges in the state had become coeducational, except for The Citadel. The district court refused to admit the legislative committee report into evidence, finding that it lacked trustworthiness because of the control of Citadel alumni over the committee and its report. Trial Transcript dated 5/27/94 at 63-64.

Turning to remedy, the District Court found that the only available remedy to redress the violation of Ms. Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Faulkner I*, 858 F. Supp. at 568. The district court found that defendants refused to propose or develop any remedial plan while still doing their utmost to keep

Ms. Faulkner out of The Citadel. The district court found that "no effort has been made to determine the feasibility of any specific remedy" or even contact the state legislature about the plan. *Id.* The district court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567. It concluded that:

> [A]ll of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

Id. at 568.

The district court ordered defendants to (i) immediately admit Ms. Faulkner, and (ii) admit all other qualified women for the 1995-96 school year unless defendants filed a remedial plan to address the violation of their rights, and implement such a proposal by August 1995.

Significantly, the district court did not permit the parties to present any evidence on the purported benefits of single-sex education or the effect of the admission of women into The Citadel. Ms. Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Ms. Faulkner's motion for summary judgment. The district court specifically reserved Ms. Faulkner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5.

The Court of Appeals granted defendants' application for a stay in a 2-1 decision, without opinion. Order of the United States Court of Appeals for the Fourth Circuit dated August 12, 1994. Judge Hall filed a dissenting opinion. *Id.*

On October 4, 1994, South Carolina filed yet another "plan to plan" for a remedial proposal which did not specify any particular program or even select a host institution. The district court advised defendants that their so-called "plan" was incapable of review.

The Court of Appeals' Decision in the Citadel Case

On April 13, 1995, the Fourth Circuit affirmed the liability determination of the district court, but modified the remedial order. *Faulkner II*, 51 F.3d 440 (4th Cir. 1995) It held that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other qualified young women to equal protection in that South Carolina provides men with a unique and valuable military-style education at The Citadel, but denies women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). The Court of Appeals ruled that defendants failed to offer any remedy for the violation of Ms. Faulkner's rights and that their actions "clearly and unequivocally" indicated that they would use "all of their considerable influence" to ensure that Ms. Faulkner was excluded from any remedial plan. *Id.* at 446-47. It held that defendants had been on notice since 1992, when the Fourth Circuit held VMI's males-only admission policy unconstitutional, that South Carolina must adopt a remedy. *Id.* at 447.

While the Court of Appeals recognized that many women could perform as well as men at VMI and The Citadel, it modified the district court order to permit South Carolina yet another opportunity to propose a separate program for women before August 1995. It also held that, under *VMI II*, South Carolina could remedy the equal protection violation by creating a separate, non-military program for women that differs "in form and detail" from The Citadel's Corps of Cadets program. *Id.* at 443.

In a concurring opinion, Judge Hall stated his view that the only remedy possible was the integration of women into The Citadel. Judge Hall disagreed with the principles in *VMI I* and *VMI II*, saying that while he was bound to respect the precedents of the Fourth Circuit, "I am convinced that we have

embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility." *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring). He concluded that, under *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms . . . . Separate educational facilities are inherently unequal." *Id.* at 451.

In his *Faulkner* concurrence, Judge Hall wrote that the Fourth Circuit decisions in *VMI* "promoted a means to an end — single gender education — to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.* He rejected Judge Niemeyer's assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.* He explained:

> The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy . . . . As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

Id.

South Carolina's Defective Remedial Proposal

Prompted by the pending admission of Ms. Faulkner into the Corps of Cadets, as a result of the Fourth Circuit decision, Citadel alumni donated $5 million from the Citadel Development Foundation to entice Converse College, a private women's college, to agree to provide a non-military "parallel" program for women. South Carolina's Proposed Reme-

dial Plan dated 6/5/95 at 8-9. In addition, Citadel alumni who were members of the South Carolina General Assembly sponsored an amendment to the state budget bill allocating $1.4 million to fund initial capital and operating costs for the Converse program. Journal of the Senate of the State of South Carolina dated 5/4/95. The Citadel's full-time lobbyist, a state employee, worked with the alumni to insure passage of the legislation. Legare deposition transcript dated 10/4/95 at 23. To circumvent a state statute that only permits a public college to employ one lobbyist, The Citadel arranged for the Association of Citadel Men, another alumni organization, to hire three additional lobbyists to ensure the adoption of the legislation. *Id.* at 102.

Under South Carolina law, the supplemental appropriation of funds for the Converse plan required approval of the Commission of Higher Education. S.C. Code Ann. §59-103-35. The General Assembly approved the legislation, which was part of the state budget bill, before specific requirements or substance of the Converse plan were even developed. During a ten-hour floor debate, Glenn McConnell, a Charleston state senator, warned that a vote against funding the Converse plan "would spell the death of The Citadel as we know it." Transcript of district court 7/19/95 hearing at 115. Under the legislation, South Carolina is not obligated to fund any portion of the Converse program unless and until the Fourth Circuit approves the remedial proposal. Agreement between the State of South Carolina and Converse College, exhibit 3 to South Carolina's Proposed Remedial Plan at 3-4.

Rather than reflecting a genuine commitment to expanding educational opportunities for women, the legislation specifically provides that the expression of a state "policy" for single-sex education is null and void if the Supreme Court issues an order admitting women into VMI. Journal of the Senate of the State of South Carolina dated 5/4/95. In addition, the continued operation of the Converse program is dependent upon The Citadel contributing an additional $3 million to Converse to cover its necessary expenses during the first four years of the program's operation. Agreement be-

tween Converse College and The Citadel, exhibit 12 to South Carolina's Proposed Remedial Plan at 3-4. Of the total $11.4 million required to operate the program, The Citadel and its alumni will fund $8 million.

The Citadel defendants contend that the Fourth Circuit in *VMI I* and *VMI II* held as a matter of law that single-sex education is valuable and that the admission of women to The Citadel would materially change its program. They have filed numerous motions to limit the issues at trial to (1) whether the program has the same mission and goals as The Citadel; and (2) whether it is intended to achieve the same outcomes as The Citadel. The district court has scheduled a trial commencing on December 4, 1995 to review South Carolina's remedial plan.

SUMMARY OF ARGUMENT

The decision below reinvokes the wholesale exclusion of an entire class of persons from unique and prestigious public institutions of higher education that has not been countenanced by this Court since *Plessy v. Ferguson*, 163 U.S. 537 (1896), when separate educational facilities for African-Americans were lawful. In *VMI I*, the Fourth Circuit held that VMI's males-only admission policy was not substantially related to an important governmental interest. While the Fourth Circuit found that "some women would qualify for and benefit from" VMI, it nevertheless refused to require their admission "in light of the generally recognized benefits that VMI offers men and the changes that would occur if women were admitted." *VMI I*, 976 F.2d at 846, 900. In *VMI II*, the Fourth Circuit authorized Virginia to remedy the discriminatory exclusion of women from VMI's rigorous military-style program by creating a brand-new program for women at Mary Baldwin College (the "VWIL" program), which the district court found failed the "separate but equal" test in *Plessy*. While the Fourth Circuit conceded that the Mary Baldwin program "lacked the prestige and benefits of a degree from VMI," it ruled that VWIL seeks to teach women leadership and therefore is "suf-

ficiently comparable" to justify the preservation of VMI as an all-male college. *VMI II*, 44 F.3d at 1241.

Given the widespread integration of women into the military, the notion that women would "destroy" VMI is based neither on fact nor reasoning, but on prejudicial beliefs about the proper role and interests of women that are "relic[s] of the nineteenth [century]." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). In authorizing a segregated and manifestly inferior program for women, the Fourth Circuit relied upon stereotypical and overly broad generalizations about "differences" in the "educational needs" of "most" women and men reminiscent of those used to justify racial segregation. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995), this Court reaffirmed "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." *VMI II* violates this fundamental principle, denying qualified women like Nancy Mellette a military-style college solely because of their membership in a group which, like African-Americans, historically has been denied access to important avenues of power and opportunity.

Moreover, the holding in *VMI II* that colleges can reach similar results with different methods necessarily precludes a finding that the exclusion of women from VMI is substantially related to an important governmental objective. If the Fourth Circuit is correct, then The Citadel and VMI can achieve similar outcomes even if the admission of women required certain accommodations in their educational method. On the other hand, if the adversative method is essential to the nature of The Citadel or VMI, then a non-adversative program for women cannot be either equal or comparable. The Fourth Circuit in effect uses a double standard in measuring equal protection: men are entitled to a unique educational methodology offered by The Citadel, unsullied by the presence of women, but women are merely entitled to "comparable outcomes."

This case is not about Virginia's failure to provide women with "single-sex education," nor is it about a classification based upon "homogeneity of gender," as suggested in *VMI II*.

VMI II, 44 F.3d at 1233. It is about the historical exclusion of women from a unique and prestigious state military college. It is about the influence and political clout of VMI (and Citadel) alumni, who together have contributed nearly $15 million to preserve their alma mater "from the unwelcome intrusion of women." *See United States v. Commonwealth of Virginia*, 52 F.3d 90, 92 n.3 (Motz, J. dissenting from denial of rehearing en banc). It is about "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring).[2] Women like Nancy Mellette who are qualified for the rigors of the military program at VMI are entitled not merely to a "comparable education" at another college, but to "equal access to important avenues of power and responsibility" that VMI offers its male graduates and alumni. *Id.*

I

THE HISTORICAL EXCLUSION OF QUALIFIED WOMEN FROM A PRESTIGIOUS PUBLIC PROGRAM OF HIGHER EDUCATION, SOLELY ON THE BASIS OF THEIR SEX, VIOLATES EQUAL PROTECTION

A. VMI and The Citadel Are Prestigious Military-Style Colleges That Offer Male Graduates Unique and Intangible Benefits

VMI is a military college with a "distinctive educational method" that is "unique in all the world." *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1415 (1991). It offers an "intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates." *Id.* at 1414. Since its founding, VMI

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[2] Nor is this a case about compensatory educational programs for historically disadvantaged groups. Virginia does not assert that the sex-segregated programs proposed in this case or The Citadel case are an affirmative attempt to rectify historical discrimination against women.

has occupied a prominent place in the military history of Virginia. In the first sentence of the district court opinion finding VMI's males-only policy constitutional, Judge Kiser described the historical role of VMI cadets in the Civil War when they confronted the United States in May of 1864. *Id.* at 1408.

Today, VMI remains a prestigious institution which offers its alumni access to a wealth of political and socioeconomic opportunities. A VMI education does not merely train men to become "citizen-soldiers," it bestows a prestigious degree that serves as an entree into an alumni network with "powerful political and economic ties." *VMI II*, 44 F.3d at 1250. Even the majority panel in *VMI II* conceded that VMI offers its graduates the invaluable benefits of its prestige and reputation. *Id.* at 1241.

VMI was not founded as a "single-sex" institution, but as a military college for men only. Since its founding in 1839, VMI admitted only men, not because of any "pedagogical" belief in "single-sex" education, but because women were excluded from the military. As Judge Phillips points out:

> When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women.

44 F.2d at 1243 (Phillips, J. dissenting). "Single-gender education" is not an educational method at VMI, "it is, at best, a stratagem to achieve the Commonwealth's real objective - preservation of VMI . . . from the unwelcome intrusion of women." *VMI*, 52 F.3d 90, 92 (4th Cir. 1995) (Motz, J. dissenting).

While The Citadel employs a different methodology than VMI in its military program, it similarly occupies a unique

place in the history and tradition of South Carolina. According to the South Carolina Commission on Higher Education, a "unique feature" of The Citadel is "the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Faulkner I*, 858 F. Supp. at 556 (citing Commission for Higher Education Master Plan). The Citadel was founded in 1842 as the military college of South Carolina.

Because The Citadel is designated as a military college, the legislature "deemed it appropriate" to exclude women. *Williams v. McNair*, 316 F. Supp. 134, 136 (D.S.C., 1970), *aff'd by divided court without written opinion*, 401 U.S. 951 (1971). Prior to litigation against The Citadel, there was no document or written policy of South Carolina discussing the supposed benefits of "single-gender education." The claim now made by South Carolina that it has a "policy" of supporting "single-gender" education is entirely a contrived post-litigation rationalization. In fact, the defendants in the Citadel litigation have conceded that, prior to the commencement of litigation, no study of the alleged value of "single-gender education" had ever been done by South Carolina or The Citadel.

B. The Exclusion of Qualified Women from a Public Program of Higher Education is Not Substantially Related to an Important Governmental Objective

In *Brown I*, 347 U.S. 483 (1954), this Court recognized that "education is perhaps the most important function of state and local governments." This Court held that "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 488; *see also United States v. Fordice*, 505 U.S. 717 (1992). This Court repeatedly has held that the opportunity for a public education is not limited to the tangible components of a program, such as the physical facilities or course offerings. Educational opportunity includes access to those qualities "that make for greatness in a . . .

school," including the ability to develop working relationships with one's peers. *Sweatt v. Painter*, 339 U.S. 629, 634 (1954).

Under intermediate scrutiny, this Court has never upheld a state classification that perpetuates the historical exclusion of women from public higher education. This Court repeatedly has recognized that women have suffered a "long and unfortunate history of sex discrimination," including in public education, where they still face "pervasive" discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994) (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive). The decision to deny qualified students access to public education solely on the basis of their sex is unlawful absent "an exceedingly persuasive justification." *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). This Court consistently has rejected sex-based classifications that have disadvantaged women, and only occasionally upheld classifications which serve women with a "benign and compensatory purpose." *See, e.g., Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 421 U.S. 906 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

In *Hogan*, this Court struck down the female-only admission policy of the Nursing School of Mississippi University for Women ("MUW"), even though Mississippi offered men a comparable nursing program less than thirty miles away. While the dissent in *Hogan* wrote that offering the choice of single-sex education for women was valuable, this Court required Mississippi to prove that its discriminatory classification "is substantially related to an important governmental objective." *Hogan*, 458 U.S. at 721-722. This Court rejected Mississippi's argument that MUW's single-sex program compensated women for past discrimination in education. This Court held that women were overrepresented in nursing, and that MUW's female-only admission policy reinforced traditional stereotypes of the proper roles of men and women.

There is no principled reason that the same result should not obtain here. While a state might justify a program for women that was narrowly tailored to compensate women for past discrimination, the historical exclusion of women from the prestige and opportunities offered men at VMI plainly does not serve any compensatory purpose.

1. The Wholesale Exclusion of Women From VMI is Based On Stereotypical and Impermissible Generalizations

The decision below is based upon generalizations and stereotypes expressly prohibited by this Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), *Hogan*, and other cases. Even if there is some statistical support for the argument that some women (and men) might benefit from a non-military program, a state may not exclude qualified women from VMI based simply upon a finding that most women (and men) are physically or psychologically unfit to participate in a military-style program. *See J.E.B.*, 114 S. Ct. at 1427 n.11. And even if there is a "measure of truth" in some of the stereotypes used to justify gender classifications, they cannot justify the refusal to admit women to VMI or The Citadel. To deny Nancy Mellette and other women admission to a public college for which they are indisputably qualified, solely because of their gender, perverts the fundamental principle of equal opportunity upon which this Nation rests. *See Adarand*, 115 S.Ct. at 2112.

2. The Assertion that the Admission of Women Will "Change" VMI Is Not Constitutionally Sufficient to Deny Women a Military-Style Education

VMI argues that the admission of women would materially change certain aspects of its program, making it more like the federal service academies. The lower courts agreed, finding that "[e]ven if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. The lower courts did *not* find that the changes would nega-

tively affect the ability of male cadets (or female cadets) to learn to become citizen-soldiers. Rather, they advanced the novel, and unsupported, theory that the prospect of *any* change in VMI's program, no matter how trivial, justified maintaining the purity of its admissions policy. *See, e.g., VMI II*, 44 F. 3d at 1440 ("the program would be irrevocably altered, forever denying its unique methodology to both men and women").

The district court found, for example, that "if VMI were to admit women, it would become more similar to the Virginia Polytechnical Institute, so that its uniqueness would be lost." The district court conceded that a coeducated VMI would still be unique, because "[e]ven if this were to occur, VMI would remain the only small college campus in Virginia offering a military program" and that women "would benefit from the availability of VMI." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. Despite that admission, the district court concluded, without any evidence, that the potential benefits to women were outweighed by the resulting changes in VMI's "process." *See id.* It concluded:

> VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

Id. at 1415.

If the lower courts are correct that a public institution may exclude qualified applicants that may affect any aspect of its program, this nation's schools would be segregated to this day. The specter of "change" is constitutionally insufficient to deny qualified applicants admission to a public college. Moreover, it is logically inconsistent with the finding in *VMI II* that a college can achieve the same mission or goals under a variety of educational methods. If that is the case, Virginia cannot exclude women simply because VMI may have to put shades

on cadets's windows or locks on doors. The notion that women will "destroy" an institution ignores the reality that all of the federal service academies have admitted women for the past twenty years. This fear of women, which one Citadel expert likened to a "toxic virus," is neither a legitimate, nor important, state objective.

3. Virginia Cannot Deny Women a Unique Military-Style Education Under a Supposed Policy of "Diversity" or "Single-Sex Education"

Virginia's post hoc rationalization that VMI is a "single gender" college is not a true state policy, but an attempt to preserve its all male tradition. The Fourth Circuit found that VMI failed to offer any evidence of the existence of a policy of supporting single-sex education. *VMI I*, 976 F.2d at 898. To the contrary, the Fourth Circuit noted that the only official statement on the issue announced a policy of equal access and educational opportunities for both men and women. *Id.* The existence of such a policy is not consistent with the trend in Virginia toward coeducation. Each of the formerly public single-sex colleges in Virginia became coeducational, with the exception of VMI. The same is true of South Carolina. *See infra* at p. 4.

Even assuming that Virginia in fact had a policy of offering diversity or promoting single-sex education, it would not justify offering men, and not women, the benefits of a military-style education at VMI. A gender classification must do more than benefit members of the favored gender. *Hogan*, 458 U.S. at 731 n.17. As this Court explained, "since any gender-based classification provides one class a benefit or choice not available to the other class, . . . [the] argument begs the question." *Hogan*, 458 U.S. at 731 n. 17. Similarly, "[a] policy of diversity is not advanced by the establishment of an institution for only one gender." *Faulkner*, 10 F.3d at 232; *VMI*, 976 F.2d at 892.

II

VIRGINIA'S DECISION TO CONTINUE THE EXCLUSION OF WOMEN FROM VMI AND SEGREGATING WOMEN IN A SEPARATE AND INTENTIONALLY UNEQUAL PROGRAM COMPOUNDS THE ORIGINAL VIOLATION

A. *The Decisions Below Rest Upon Outmoded Stereotypes and Generalizations About Women That This Court Repeatedly has Rejected*

Rather than remedy the invidious exclusion of women from *VMI* (and The Citadel), *VMI II* compounds the violation by institutionalizing stereotypical and overly broad generalizations about men and women. In approving Virginia's remedial plan of sex-segregation, the Court of Appeals held that there are "acknowledged differences" in the educational "needs" of men and women that render women unsuitable for the rigors and stress of the VMI program. The Court of Appeals also based its exclusion of women on its observation that:

> If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

VMI II, 44 F.3d at 1239.

By branding all women as inappropriate or unfit for the rigors or stress of VMI and The Citadel, the decision below perpetuates prejudices and stereotypes that historically have been used to deny women equal access to employment, education, and the military. Just as this Court found that the Mississippi University for Women's "policy [of excluding males from admission to the School of Nursing] tends to perpetuate the stereotyped view of nursing, as an exclusively

woman's job," *Hogan*, 458 U.S. at 718, so does the exclusion of women from VMI perpetuate the stereotyped view of the military as exclusively a man's job. Segregating women into a separate program which Virginia lawmakers consider "more appropriate" for women robs young women of the choice to pursue a challenging military education. It is for women "to decide in which direction [their] advantage lies," *McKissick v. Carmichael*, 187 F.2d 949, 954 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

This genteel notion of a "sense of decency" between the sexes is reminiscent of chivalric, paternalistic rationales for treating women as less than equals. It is a modern day equivalent of the protectionist rationales used, for example, to limit women's employment opportunities (*see Muller v. Oregon*, 208 U.S. 412, 421 (1908) (women who work long hours on their feet suffer "injurious effects, upon the body, and, as healthy mothers are essential to vigorous offspring, their physical well-being becomes an object of public interest and care"); and to exclude women from juries (*see, e.g., Mississippi v. Hall*, 187 So. 2d 861, 863 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966) (women may be excluded from juries in part "to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial")).

B. The Fourth Circuit Failed to Subject Virginia's Asserted Objective to Heightened Scrutiny as Required Under Hogan

In abandoning the well-established analysis employed by this Court in *Hogan*, the Fourth Circuit contrived its own "special intermediate scrutiny test" which effectively substitutes review under the rational basis test in place of the heightened scrutiny required by this Court. *See VMI II*, 44 F.3d at 1237. The "special" test eliminates the requirement in *Hogan* that a state demonstrate that its asserted governmental objective is sufficiently important to exclude an entire gender from a public college. Instead, the Fourth Circuit held that federal courts should "defer" to a state's recitation of the governmental ob-

jective served by a discriminatory sex-based classification, so long as the purpose "is not pernicious and does not violate traditional notions of the role of government." *VMI II*, 44 F.3d at 1237. The Court of Appeals conceded that "[t]he cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis." *Id.* at 1236.

This "deferential" treatment of a state's proffered justification insulates from scrutiny the very kinds of state declarations of purpose that courts are required to scrutinize, a dangerous throwback to the pre-*Reed* v. *Reed*[3] era, when gender classifications were presumed valid. The Court of Appeals failed to inquire whether Virginia's asserted objective in offering single-gender education in fact was the actual purpose of Virginia's remedial proposal, rather than its self-evident desire to perpetuate the all-male tradition of the school. This omission is particularly egregious because, as Judge Phillips points out, the proposal is a "judicially required remedy" for a discriminatory and invidious gender classification. *VMI II*, 44 F.3d at 1248.

Until this litigation, Virginia never sought to provide women with "single-sex" educational opportunities. It has not done so today. Without the millions of dollars donated by alumni committed to preserving VMI's all-male tradition, there would be no state-sponsored parallel program for women.

Taking judicial notice of matters commonly known in Virginia, Judge Phillips concluded that

> the prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interest is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objec-

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[3] Reed v. Reed, 404 U.S. 71 (1971).

> tive of the . . . proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end.

*Id.*at 1247 n. 5.

The governmental objectives proffered by Virginia to support the continued exclusion of women from VMI "demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement." *VMI II*, 44 F.3d at 1247. As Judge Phillips concluded

> the primary, overriding purpose is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.

Id.

In addition, the Fourth Circuit failed to find that offering "single-sex" education is sufficiently legitimate and important to justify the permanent exclusion of women from a prestigious public college. Unlike the rational basis test, heightened scrutiny requires that a state demonstrate that its proffered objective is sufficiently important to justify preferential treatment of one gender. Most recently, this Court in *J.E.B.* held that even the right to an impartial jury was not a

sufficiently important interest to justify gender-based peremptory challenges. *See also Hogan*, 458 U.S. 718 (1982); *Frontiero*, 411 U.S. 677 (1974) (administrative convenience did not justify classification that awarded servicemen, and not women, spousal benefits without showing of dependency).

In light of *J.E.B*, the possibility that single-sex education may benefit some students is plainly insufficient to justify excluding women from VMI because of the supposed "educational needs" of "most" women. Not only is the purported interest in providing a particular type of education far less compelling than the constitutionally protected right to a fair trial, the Fourth Circuit acknowledged that there is disagreement among professionals over the supposed value of single-sex colleges. *VMI II*, 44 F.3d at 1230. In fact, there is no credible evidence that single-sex education for men is more beneficial than coeducation. For example, the Fourth Circuit in *VMI I* relied on findings by Alexander Astin, who did *not* testify at the trial, in his 1977 book, *Four Critical Years*, as to the value of single-sex education. *VMI I*, 976 F.2d at 897. Dr. Astin has now testified on behalf of the United States and Ms. Faulkner in *VMI* and *Faulkner*. His more recent research demonstrates that the single-sex admission policies of the colleges he studied in the late 1960s (when women were barred from Ivy League colleges) did *not* cause the effects he observed in his first study: the positive benefits remained *even after the schools became coeducational*.[4]

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[4] The Fourth Circuit also relied upon Carol Gilligan's book, *In a Different Voice*, in discussing the finding of the district court. Like Dr. Astin, Dr. Gilligan did not testify at trial in VMI, but has appeared as a witness on behalf of Ms. Faulkner to testify that males-only colleges like The Citadel are harmful to men. She has filed an amicus brief on behalf of the United States in this proceeding.

C. *Virginia Cannot Remedy the Invidious Exclusion of Women from VMI by Creating a Separate and Intentionally Unequal Program That Lacks the Prestige, Tradition, or Reputation Offered at VMI*

Virginia cannot justify excluding women from VMI by claiming that it offers a "substantively comparable" education at another college. This Court in *Hogan* held that the exclusion of men from Mississippi University for Women's all-female nursing program was unconstitutional even though Mississippi offered men comparable nursing programs nearby. *Hogan*, 458 U.S. at 718. The classification under attack is the males-only admission policy of VMI. Whether or not Virginia offers women opportunities for a college education elsewhere is just as irrelevant as whether the male plaintiff in *Hogan* could attend another public nursing program.[5]

Even under the "separate but equal" rule of *Plessy v. Ferguson*, "a basic prerequisite was that [the separate programs] be truly, *substantially* equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated." *VMI II*, 44 F.3d at 1249 (Phillips, J., dissenting). This Court repeatedly held that a separate and newly created educational program cannot duplicate the prestige, history or access to powerful alumni or professional networks of a well-established school. *Sweatt v. Painter*, 339 U.S. 629 (1954); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). The principles of equal protection announced in *Sweatt* and *McLaurin* apply equally to segregation based on sex. *See VMI*, 52 F.3d at 93 (Motz, J. dissenting); *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring); *VMI II*, 44 F.3d at 1249 (Phillips, J. dissenting).

As the Virginia district court held in *VMI*, "if separate but equal is the standard by which the [remedial] plan must be measured, then it surely must fail." *United States v. Common-*

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[5] This Court has rejected a similar "bottom line" defense under Title VII that discrimination against women in a particular program can be justified by proving that the system as a whole treats women "fairly." *Connecticut v. Teal*, 457 U.S. 440 (1982).

wealth of Virginia, 852 F. Supp. 471, 475 (1994), *aff'd*, *VMI II*, 44 F.3d 1229 (4th Cir. 1995). The lower courts concede that VWIL does not offer the "historical benefit and prestige" afforded men at VMI. *VMI II*, 44 F.3d at 1241. "[T]he contrast between [the proposed VWIL program and VMI] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation." *Id.* at 1250. Even assuming that the VWIL proposal is able to realize its goals, "it will necessarily be a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *Id.*

> The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI.

Id. Judge Phillips concluded that "[i]t is difficult to believe that one who had a free choice between [these] schools would consider the question close." *Id.*

D. The Only Constitutional Remedy is to Admit Qualified Women to VMI

Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination. *See, e.g., Brown I*, 347 U.S. at 493; *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (ordering the immediate admission of a black student into the University of Florida Law School, the only law school in the state); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (upholding immediate admission of a black student to the only public law school in Oklahoma).

Having decided to provide a military-style education at VMI, Virginia must offer that opportunity to men and women on equal terms. Women are entitled to the opportunity for an education that is equal to that offered men at VMI, not a "substantively comparable" program that lacks the historical benefit and prestige of a degree from a venerable institution established over 150 years ago. *See Faulkner II*, 51 F.3d 450-51 (Hall, J., concurring); *VMI II*, 52 F.3d at 93 (Motz, J., dissenting).

III

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS

Virginia's decision to "remedy" the unlawful exclusion of women from VMI by creating a separate and deliberately unequal program at a private women's college, funded almost entirely by VMI alumni, should be considered inherently suspect. Virginia's proposal is based solely upon generalizations and stereotypes about women that would be rejected out of hand if applied to racial or ethnic minorities. It reinvokes a history of exclusion of women from public education and denies women access to a prestigious public educational program based solely upon an inherited identifying trait over which they have no control, rather than on the basis of her individual ability and accomplishments. It is apparent that Virginia's attempt to create a separate and plainly unequal program, rather than admit women to VMI, is not substantially related to any important state interest and thus cannot survive even so-called intermediate scrutiny. It is equally apparent, however, that the intermediate scrutiny test has been unevenly applied by the lower courts and, as this case demonstrates, has often failed to protect the equal rights of women. For all of these reasons, Virginia should be required to prove that the continued exclusion of women from VMI is narrowly tailored to meet a compelling governmental interest.

On several recent occasions this Court explicitly has reserved the issue of whether strict scrutiny applies to gender classifications. *J.E.B.*, 114 S. Ct. at 1425 n.6 ("once again [the Court] need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 373 (1993); *Hogan*, 458 U.S. at 724 n.9; *Stanton v. Stanton*, 421 U.S. 7, 13 (1975). In *J.E.B.*, this Court reaffirmed without qualification "what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.*, 114 S. Ct. at 1422. This Court's decisions under the Fourteenth Amendment "reveal[s] a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring). That is so because gender is not usually relevant to any legislative classifications. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973). State policies that exclude women, like those that exclude racial minorities, historically have been rooted in prejudicial attitudes about the relative abilities and roles of men and women. *J.E.B.*, 114 S. Ct. at 1422.

Citing the plurality opinion in *Frontiero*, which applied strict scrutiny in reviewing a gender classification, this Court summarized the "long and unfortunate history of sex discrimination" that pervades this nation's history:

> [T]hroughout much of the 19th century *the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.* Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adop-

> tion of the Nineteenth Amendment half a century later.

J.E.B., 114 S. Ct. at 1425 (citing *Frontiero*, 411 U.S. at 685 (emphasis added)); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive).

Clarifying the appropriate standard of review would provide essential guidance to lower courts as to application of intermediate scrutiny. In *J.E.B*, Justice Kennedy noted that "the intermediate scrutiny test" does not "provide a very clear standard in all instances." *J.E.B.*, 114 S. Ct. at 1433-34 (Kennedy, J., concurring). Similarly, Justice Stevens observed in *City of Cleburne v. Cleburne Living Center*, "our cases have not delineated three — or even one or two — such well-defined standards." 473 U.S. 432, 451 (1985) (Stevens, J., concurring). The lower courts repeatedly have complained that the standard provides little guidance. *See, e.g., Lamprecht v. FCC*, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("We are cognizant of the problems with intermediate scrutiny"); *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 734 F. Supp. 1274, 1303 (E.D. Pa. 1990). Prior decisions have not required the resolution of this issue because most sex-based classifications have failed to meet even a more permissive standard. *See, e.g., J.E.B.*, 114 S. Ct at 1425 n.6. This case, likewise, can be resolved within the framework established by *Hogan* and *J.E.B.*, but Ms. Mellette respectfully submits that jurisprudential and practical considerations militate in favor of clarifying that classifications based on sex, like those based on race and ethnicity, require strict scrutiny.

VMI II and *Faulkner II* exemplify the serious confusion surrounding application of the appropriate level of review. In upholding a "separate and unequal" program for women, the Court of Appeals in *VMI II* held that different facilities for men and women could be justified upon generalized "dif-

ferences" between men and women as a group, even if individual women like Nancy Mellette can meet all of the qualifications of VMI or The Citadel. The Court of Appeals ignored the holdings of this Court in *J.E.B. and Hogan* rejecting classifications based upon generalizations about men and women as groups. Instead of treating such generalizations as suspect, it held that "intermediate scrutiny" presumes, as a starting point, that there are acknowledged differences between women and men, not just in their roles in human reproduction, but in their psychology, temperament and emotional characteristics. Intermediate scrutiny was designed to *eliminate* such assumptions, not validate them. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *J.E.B.*, 114 S. Ct. at 1425; *see also Cleburne*, 473 U.S. at 440.

In addition, legal scholars have noted the confusion that has arisen among lower courts as to which standard of scrutiny to apply to gender-based affirmative action programs after this Court's decision in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (establishing strict scrutiny as standard of review for race-based affirmative action plans). *See, e.g.*, S. Oliver, Jr., *A Survey of Post-Croson Developments*, 38 Loyola L. Rev. 7, 36 (1992); T. Aleinkoff, A *Case For Race-Consciousness*, 91 Colum. L. Rev. 1060, 1095 n.168 (1991). One irrational result has been that, in some federal courts, some remedial measures for sex discrimination have been judged under strict scrutiny, while others have been judged under intermediate scrutiny. *Compare, e.g., Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), *aff'd*, 947 F.2d 944 (6th Cir. 1991) (per curiam) (applying strict scrutiny to invalidate program), *with, Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (applying intermediate scrutiny to uphold program). This pattern of inconsistency is not likely to abate given this Court's recent decision in *Adarand*, subjecting race-based affirmative action programs to strict scrutiny.

Although women have won significant legal gains since the early 1970s, the need still exists for a consistent nationwide application of principles of women's equality before the

law. It is still true that "in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Frontiero*, 411 U.S. at 686. Once a court finds that a state has invidiously discriminated against women, its decision to perpetuate the exclusion of women should be subject to strict scrutiny to ensure that the remedial choice is necessary to fulfill a compelling state interest.

CONCLUSION

For the reasons stated above, this court should declare that the exclusion of women from VMI violates the right to equal protection under the Fourteenth Amendment and order the immediate admission of women into VMI.

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Respectfully submitted,

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